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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

IN RE: TOYOTA MOTOR CORP.
UNINTENDED ACCELERATION
MARKETING, SALES PRACTICES,
AND PRODUCTS LIABILITY
LITIGATION

This document relates to:
ALL CASES

CASE NO: **8:10ML2151 JVS**
(FMOx)

APPLICATION FOR
APPOINTMENT TO LEAD
COUNSEL COMMITTEE AND
CORE DISCOVERY
COMMITTEE

Date: May 13, 2010
Time: 9:00 a.m.
Place: Court Room 10C
411 W. 4th St.
Santa Ana, CA 92701

I. INTRODUCTION

Branstetter, Stranch & Jennings, PLLC (“the Branstetter Firm” or “the Firm”), counsel for plaintiffs in separately filed economic-loss actions in this Multi-District Litigation¹, hereby moves pursuant to the Court’s Order of April 14,

¹ The Firm is counsel for plaintiffs in the filed-actions *Kallenbach et al. v. Toyota Motor Sales U.S.A, Inc. et al.*, CV10-1604-CAS (PLAx) and *Brown v. Toyota Motor Sales USA Inc., et al*, 2:10-cv-02284-PA-JEM.

1 2010 to appoint the Firm to serve on the Lead Counsel Committee for the
2 Economic Loss Plaintiffs and Core Discovery Committee on behalf of all
3 Plaintiffs.

4 Pending before the Court is a large-scale MDL proceeding involving both
5 personal injury and economic loss claims arising from allegations of a common,
6 wrongful course of action by the Defendants (the “Actions”). In its Order of April
7 14, 2010, the Court announced that it would accept applications from individual
8 plaintiffs’ counsel to lead the Actions on behalf of all plaintiffs, to identify and
9 conduct core discovery, and to ensure the effective management of the case as a
10 whole.

11 As demonstrated below and in the attached Firm Resume, the Branstetter
12 Firm has an extensive record in complex litigation exhibiting its knowledge,
13 expertise, willingness to work side-by-side with co-counsel, and ability to achieve
14 successful outcomes in cases of this scale, as thus believes it would be an
15 invaluable member of the Lead Counsel Committee and Core Discovery
16 Committee. Importantly, the Firm has attorneys with extensive trial experience,
17 including personal injury actions, pure economic loss actions, and class actions,
18 and has served in leadership positions in complex litigation cases against foreign
19 defendants. The Branstetter Firm submits this application on its own behalf
20 pursuant to the Court’s Order, understanding that other panels or committees of
21 plaintiffs’ counsel to the Actions have submitted group applications, and without
22 taking a position on the merits or permissibility of such group applications.

23 **II. THE BRANSTETTER FIRM MEETS ALL OF THE NAMED** 24 **CRITERIA FOR APPOINTMENT**

25 The Court has identified the following major factors influencing the
26 appointment to the Lead Counsel Committee: (1) knowledge and experience in
27 prosecuting complex litigation and class actions; (2) willingness and ability to
28 commit to a time-consuming process; (3) ability to work cooperatively with others;

1 and (4) access to sufficient resources to prosecute the litigation in a timely manner.
 2 All of these factors weigh in favor of appointing the Branstetter Firm to serve on
 3 the Lead Counsel Committee for the Economic Loss Plaintiffs. The Firm possesses
 4 the skill, experience, and resources to efficiently coordinate all of the Economic
 5 Loss Plaintiffs' common interests in prosecuting the Actions, while streamlining
 6 the discovery process and avoiding duplicative and unproductive effort.

7 **A. Knowledge and Experience in Prosecuting Complex Litigation**
 8 **and Class Actions**

9 The Branstetter Firm has extensive experience in the class actions legal
 10 arena and specifically in consumer protection and fair trade practices cases, all of
 11 which involve economic loss claims similar to those at bar.

12 **1. Extensive Experience and Resources to Coordinate**
 13 **Complex Litigation Cases, Particularly Those Involving**
 14 **Voluminous Discovery of a Foreign Entity**

15 Significantly, the Branstetter Firm is accustomed to dealing with the unique
 16 challenges of litigating against foreign corporations, and understands both the
 17 domestic and international legal issues that frequently arise when conducting pre-
 18 trial discovery in such matters. The Firm currently serves as Co-Lead Counsel of
 19 the third-party-payor class action and serves on the Plaintiffs' Executive
 20 Committee of the pharmaceutical litigation *In re Trasylol Products Liability*
 21 *Litigation*, MDL No. 1928, Case No. 9:08-cv-80873 (S.D. Fla.), which is very
 22 similar to the case at bar in that it involves both product liability/personal injury
 23 claims and class action allegations. One of the defendants in *Trasylol* is Bayer
 24 Healthcare, A.G., a corporation headquartered in Germany. Not only did the Firm
 25 play a significant role in the overall discovery process, but it took the primary role
 26 in developing the process for reviewing German-language document production,
 27 and coordinated and conducted German-language depositions in Europe that
 28 required the use of interpreters. The Firm undertook similar responsibilities as

1 counsel in the *In Re: Dynamic Random Access Memory (DRAM) Antitrust*
2 *Litigation*, Case No. M-02-1486 PJH (N.D. Cal.), which involved several foreign
3 defendants. Such experience with discovery of a foreign defendant will be
4 invaluable to class counsel litigating against Toyota Motor Corporation, a Japanese
5 corporation, and affiliated entities.

6 The Branstetter Firm enjoys a long and distinguished litigation record, both
7 in Tennessee and federal courts, in consumer protection, products liability and
8 other class actions. The Branstetter Firm as a Tennessee-based firm has
9 successfully litigated cases in Tennessee Courts for over 50 years, and has handled
10 complex litigation matters successfully for over three decades. The Branstetter
11 Firm's senior partner, Cecil Branstetter, has been a licensed attorney in the state of
12 Tennessee for over 55 years and is universally recognized as a lion of the Nashville
13 bar. Each of the Firm's senior partners has tried numerous cases, and most of the
14 senior partners retain a litigation-heavy case load. In particular, the Firm has
15 extensive experience in a wide-range of class action litigations, including antitrust,
16 ERISA, and corporate merger-related breach of fiduciary duty claims.

17 The Branstetter Firm's experience in class action litigation began over thirty
18 years ago in *Ewing et al. v. Neuhoff, et al.*, (Frosty Morn, Inc. Litigation) (Law and
19 Equity Court, Montgomery County), in which the firm obtained a successful jury
20 verdict on behalf of a class of employees at Frosty Morn, Inc., who were able to
21 recover 100% of the losses inflicted upon their trust funds resulting from various
22 unlawful activities by company's directors. More recently, the firm represented a
23 class of Tennessee consumers in a Tennessee consumer protection action styled
24 *Sherwood et. al. v. Microsoft Corporation*, Case No. 99C-3562 (Cir. Ct. Davidson
25 Cty., Tenn.), which resulted in a potential recovery by individual consumers valued
26 at \$64 million and a ground-breaking *cy pres* award to Tennessee schools worth in
27 excess of \$30 million dollars. Additionally, the firm served as lead counsel in *In*
28 *re: Qwest Communications, Inc. ERISA Litigation*, Civil Case No. 02-cv-00464-

1 REB-PAC (D. Colo.), in which the firm recovered more than \$37.5 million on
2 behalf of 81,000 Qwest employees participating in the Qwest 401(k) benefits plan,
3 and as Co-Lead Counsel in *In re Alfa Corp. Shareholder Litigation*, Case No. 03-
4 CV-2007-900485.00 (Cir. Ct., Montgomery, Alabama), which resulted in \$161
5 million increased consideration going to the shareholder class in a private sale of
6 the company. These class actions, brought on behalf of tens of thousands of
7 plaintiffs, demonstrate that the Branstetter Firm possesses both the expertise and
8 resources to administer complex litigation cases from start through finish. In
9 addition to the above, the Branstetter Firm has served as Lead or Co-Lead Counsel
10 prosecuting a variety of complex litigation matters, including antitrust, securities,
11 and shareholder derivative matters involving large corporate defendants throughout
12 the United States and the world.

13 More relevantly for the case at bar, the Branstetter Firm has coordinated
14 numerous times in providing effective leadership as either Lead Counsel or
15 Executive Committee member in class action litigation on behalf of consumer
16 plaintiffs alleging purely economic losses, including:

- 17 • Davidson v. Bridgestone/Firestone, Inc and Ford Motor Co. No. 00-C2298
18 (Davidson Circuit, Tennessee) (Soloman/Brothers). Lead counsel in a
19 consumer action filed on behalf of a nationwide class of consumers against
20 Bridgestone/Firestone, Inc., and Ford Motor Co. that was certified as a
21 nationwide class action concerning defective tires. Settlement was reached
22 in conjunction with a companion case in Texas, valued at \$34.4 million.
- 23 • Heilman et al. v. Perfection Corporation, et al., Civ. No. 99-0679-CD-W-6
24 (W.D. Missouri). The Firm served on executive committee in a nation-wide
25 consumer class action composed of all persons throughout the United States
26 who owned or purchased a hot water heater manufactured by defendants
27 with a defective dip tube. Settlement reached involved 100 percent recovery
28 of damages for a possible 14.2 million hot water heaters and any other

property damages caused by a defective hot water heater.

- Cox v. Shell Oil et al., Civ. No. 18844 (Weakley Chancery, Tennessee) (Judge Malon). Intervened in consumer class action composed of all persons throughout the United States who owned or purchased polybutylene piping systems used in residential constructions or mobile homes that were defective. A global settlement was reached that resolved two competing lawsuits that was valued at \$1 billion.
- Plumbers & Pipefitters Local 572 Health & Welfare Fund et al. v. Bristol-Myers Squibb Co., Case No. 00-C-2524, (Davidson Circuit, Tennessee) (Judge Shipley). Lead counsel in action against Bristol-Myers alleging violations of the Tennessee Consumer Protection Act and the Tennessee Trades Practice Act and other theories as a result of anti-competitive, unfair and deceptive acts and practices regarding Bristol-Myers' marketing and selling of the drug Taxol. A global settlement was reached in conjunction with a multi-state indirect companion case in the District of Columbia.
- In re: Columbia/HCA Healthcare Corporation Billing Practices Litigation, No. 3-98-MDL-1227 (M. D. Tenn.) (Higgins). The firm served as liaison counsel in a multi-district litigation brought on behalf of all third-party payers against Columbia Health Care Corporation/HCA Healthcare Corporation alleging over billing for services. Settlement was reached on a cash payment, modifications in billing documents and admission practices.
- Lankford v. Dow Chemical et al. No. 04-1517 (Davidson Circuit, Tennessee) (Judge Shipley). Lead counsel in a consumer and indirect purchaser class action filed on behalf of Tennessee purchasers of products containing neoprene against Dow Chemical Company, E.I. du Pont de Nemours and DuPont Dow Elastomers, LLC, alleging violation of the Tennessee Consumer Protection Act and the Tennessee Trades Act. A multi-state settlement was reached that was valued at \$4.2 million.

1 As its participation in other large class actions indicates, the Firm has
2 adequate resources to vigorously prosecute the claims of the Economic Loss
3 Plaintiffs. The Firm is well-capitalized and has a depth of talent to commit to the
4 case. It consists of fifteen attorneys, including twelve members, two associates,
5 and one of counsel. Most of the attorneys concentrate their practice on litigation in
6 both federal and state courts. Half of the members devote a majority of their
7 practice to complex litigation. One of these, Steven J. Simerlein, is licensed in
8 California and practiced there for seventeen years before joining the Firm in 2008.
9 In addition, to help the Firm manage the often voluminous written discovery in its
10 complex litigation cases, it retains a number of full-time contract attorneys for
11 document review. From discovery in other complex cases, the Firm has also
12 gained familiarity with a variety of litigation management software and online
13 document depositories. Lastly, the Branstetter Firm has had substantial experience
14 in working with experts in complex litigation cases to determine issues of
15 economic losses. *See, e.g., In re Montana Power ERISA Litigation*, No. 4:02-0099
16 (D. Mont.) (Haddon) (expert retained to determine losses inflicted to employee
17 retirement accounts as a result of defendant's conduct); *In re: King*
18 *Pharmaceuticals, Inc. Derivative Litigation*, Civil. No. B0019077 (M) (Sullivan
19 Chancery, Tennessee) (Judge McLellan) (expert retained to determine
20 consequential money damages suffered by company as a result of defendants'
21 actions), and numerous securities and merger-related litigation referenced on the
22 Firm's resume.

23 The Branstetter Firm is clearly adequate to serve on the Lead Counsel
24 Committee on behalf of all Economic Loss Plaintiffs, as well as on the Core
25 Discovery Committee for all plaintiffs. As demonstrated above and in these
26 attachments, these attorneys have a proven record of providing skilled and efficient
27 case management in complex actions of this nature. Therefore, the Firm is more
28 than sufficiently qualified and responsible to lead the prosecution of this large-

1 scale action and will fairly and adequately represent all the plaintiffs. To this end,
 2 the Court should appoint Branstetter Firm to serve on the Lead Counsel
 3 Committee.

4 **2. Working Knowledge of Corporations And How They** 5 **Operate**

6 The Branstetter Firm's experience in numerous securities class action,
 7 antitrust, and shareholder derivative lawsuits has given it a working knowledge of
 8 corporations, their organization and their leadership hierarchy which will prove
 9 invaluable in resolving discovery and liability issues relating to the numerous
 10 individuals and entities acting under the Toyota corporate umbrella. *See, e.g.,*
 11 *Solomon-Schrawder, et al., v. Cardionet, Inc., et al.*, No. 2:09-cv-3894-SD (E.D.
 12 Pa.) (Firm currently serving as co-lead counsel in securities case under PSLRA); *In*
 13 *re Apple Computer, Inc. Derivative Litigation*, Lead Case No. 1:06CV066692
 14 (Cali Sup. Ct.) (Firm Co-Lead in shareholder derivative suit); *In re: King*
 15 *Pharmaceuticals, Inc. Derivative Litigation*, No. BOO1907(M) (Tenn. Ch. Ct.)
 16 (Firm served as lead counsel in shareholder derivative case); *In re: Caremark RX,*
 17 *Inc. Stock Option Litigation*, No. 06 C 1329 (Tenn. Cir. Ct.) (Firm served as co-
 18 lead counsel in this class action); *Dixon, et al., v. Turner, et al.* (Dollar General
 19 Derivative Litigation), No. 01C-1322 (Tenn. Cir. Ct.) (Firm served as Lead
 20 Counsel in shareholder derivative action); *Denver Area Meat Cutters and*
 21 *Employers Pension Plan v. James L. Clayton et al.*, Case No. E-19723 (Cir. Ct.
 22 Blount Cty., Tenn.) (the Firm served as Co-Lead Counsel in fraud-in-the merger
 23 claims involving the purchase of Clayton Homes, Inc. by Warren Buffet's
 24 Berkshire Hathaway, Inc., which ultimately led to \$5 million recovery on behalf of
 25 the class of shareholders); *Elk Brand Mfg. Co. v. Coode, et al.*, No. 04CI01726
 26 (Ky. Cir. Ct.) (corporate valuation and appraisal case).

27 Additionally, while the Branstetter Firm has largely represented plaintiffs in
 28 complex litigation, it has also represented officers, directors, and other fiduciaries

1 in smaller scale cases involving D&O and other liability insurance. This
 2 experience has given the Firm a unique understanding of the panoply of issues that
 3 may affect insurance coverage, which is sure to be subject of critical importance in
 4 this matter.

5 **B. Willingness and Ability to Commit to Time-Consuming Process**

6 Class actions and other aggregate litigation save time and resources on a
 7 macro level but place far greater demands on the counsel involved. Attorneys at
 8 the Branstetter Firm are well-aware that such litigation can take substantial time to
 9 resolve. Despite best efforts to avoid delay, the Firm has had to litigate some large
 10 cases for several years. This has happened for a variety of reasons, including the
 11 bankruptcy of parties, corporate mergers and acquisitions, procedural
 12 complications in the particular case or related ones, and appeals. The Firm has
 13 diligently pursued its clients' interests through all such obstacles. As described
 14 above, *see supra* at II.A.1., it has committed a large part of its capital and human
 15 resources to complex litigation precisely so that it is prepared to see the cases
 16 through.² One cannot predict with confidence how long the instant litigation or any
 17 of its components will last. However, the Branstetter Firm is willing and capable
 18 of aggressively representing the Economic Loss Plaintiffs, regardless of the
 19 duration.

20 ² For example, in the course of the *Sherwood et. al. v. Microsoft Corporation*
 21 litigation, Microsoft, which was first filed on behalf of the class of Tennessee
 22 Consumers in December, 1999, and resolved over four years later in 2004, the
 23 Branstetter Firm fought removal to federal court, a motion to dismiss which was
 24 finally resolved at the Tennessee Appellate Court level, sought and received from a
 25 Maryland Federal Court a temporary stay prohibiting Microsoft from settling the
 26 Tennessee consumer claims in a parallel MDL proceeding, fully briefed and
 27 obtained class certification, and engaged in full motion practice on a second
 28 motion to dismiss which was overcome, all before the parties commenced with
 preliminary settlement discussions. Additionally, as Lead Counsel in the *In re:*
King Pharmaceuticals Derivative Litigation, as part of a comprehensive discovery
 plan, the Firm reviewed millions of pages of documents concerning the company's
 government reimbursement programs, conducted over forty depositions of board
 members, executive officers, and management employees, and retained and
 prepared five separate experts for trial. The case was only resolved through
 settlement after a fully-briefed cross-motions for summary judgment just a few
 weeks before the scheduled trial date and just under six years after it was first filed.

C. Ability to Work Cooperatively with Others

The Branstetter Firm has a demonstrated capacity for working cooperatively alongside other class counsel, often as co-lead counsel, liaison counsel, or an executive committee member. In fact, the Firm has partnered in several cases with counsel designated by the Court for the initial conference, Steve W. Berman and Elizabeth J. Cabraser, *see* April 14, 2010, Order at 5.

Cases in which the Firm worked with Mr. Berman and/or his firm include: *In re: Epogen and Aranesp Off-Label Marketing and Sales Practices Litigation*, Case No. 08-ML-01934 PSG (C.D. Cal.); *In re: Pharmaceutical Industry Average Wholesale Price Litigation*, MDL No. 1456, Civ. No. 01-CV-12257-PBS (D. Mass.); *In re: Aurora Dairy Corp. Organic Milk Marketing and Sales Practices*, MDL No. 1907, Case No. 4:08-MD-01907-ERW (E.D. Mo.) (Firm served on executive committee); *In re: Touch America Holdings, Inc. ERISA Litigation*, No. CV-02-106-BU-SHE (D. Mont.) (Firm served as co-lead counsel).

Cases in which the Firm worked with Ms. Cabraser and/or her firm include: *Sherwood, et al. v. Microsoft Corp.*, Case No. 99C-3562 (Tenn. Cir. Ct., 20th Dist.); *In re: Columbia/HCA Healthcare Corporation Billing Practices Litigation* (M.D. Tenn.) (Firm served as liaison counsel); *In re: Flonase Antitrust Litigation*, Case No. 2:08-cv-3301 (E.D. Pa.); *In re: Vytarin/Zeta Marketing Sales Practices and Products Liability Litigation*, MDL No. 1938, Master Docket No. 08-285 (DMC) (D.N.J.).

The Firm also has a commitment to maintaining collegial relations with defense counsel in the midst of zealous advocacy. In cases of this proportion, courts rely on counsel to avoid unnecessary disputes over discovery and other matters, which delay the outcome and consume judicial resources. As member of the Lead Counsel Committee, the Firm would insist on protecting the interests of the Economic Loss Plaintiffs while striving to reach practical agreements with defense counsel when disputes arise.

1 **III. EXPECTATIONS WITH REGARD TO ATTORNEY’S FEES**

2 The Branstetter Firm believes that the amount of attorneys’ fees recovered
3 in this matter should both adhere to precedent “common fund” recovery standards
4 and provide incentive to maximize the recovery to the plaintiffs and the class. In
5 the Ninth Circuit district courts have discretion to award fees in common fund
6 cases based on either the lodestar/multiplier method or the percentage-of-the-fund
7 method. *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1295-
8 96 (9th Cir. 1994). Since *Paul, Johnson, Alston & Hunt v. Graulity*, 886 F.2d 268,
9 272 (9th Cir. 1989) and its progeny, district courts have almost uniformly shifted to
10 the percentage-of-the-fund method. Where class counsel succeeds in creating a
11 common fund, the Ninth Circuit recognizes 25% of the fund as an initial
12 benchmark for attorney’s fees, with 20-30% as the usual range. *Vizcaino v.*
13 *Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). However, “[s]election of
14 the benchmark or any other rate must be supported by findings that take into
15 account all of the circumstances of the case.” *Id.* at 1048 (identifying size of the
16 fund, exceptional results, risk, incidental or nonmonetary benefits conferred by the
17 litigation, private retainer agreements, and financial burden on counsel as relevant
18 circumstances).

19 In the event of a common fund recovery, the Firm intends to seek fees
20 consistent with the foregoing authorities. It cannot foresee all of the circumstances
21 bearing on a fee award at the outset of the litigation. The Firm is mindful of
22 courts’ desire to preserve a recovery for the benefit of the affected class members,
23 and it would strive to fairly balance the compensation of the class with the
24 compensation of counsel who enabled a recovery.

25 **IV. CONCLUSION**

26 Litigation of this size and complexity requires effective and efficient
27 leadership by plaintiffs’ counsel. As detailed herein, the Branstetter Firm has
28 demonstrated that it possesses the requisite knowledge, resources, and respect of

1 courts and legal counsel nationwide to efficiently manage this complex action on
2 behalf of the Economic Loss Plaintiffs. The Court should, therefore, appoint the
3 Firm to the Lead Counsel Committee and to the Core Discovery Committee.

4
5 DATED: April 30, 2010

By: /s/ J. Gerard Stranch, IV

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